83-6413

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No. _____

CHRISTOPHER A. BURGER,

Petitioner,

v.

WALTER ZANT, WARDEN,
GEORGIA DIAGNOSTIC AND
CLASSIFICATION CENTER,

Respondent

PETITION FOR WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

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COUNSEL FOR PETITIONER

QUESTIONS PRESENTED

I. WHETHER PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

(A) CHRISTOPHER BURGER, AN INDIGENT, MENTALLY DEFICIENT, POSSIBLY BRAIN DAMAGED SEVENTEEN-(17) YEAR-OLD FACING THE DEATH PENALTY IN A STATE COURT CAPITAL TRIAL WAS ENTITLED TO THE APPOINTMENT OF COUNSEL WHOSE REPRESENTATION WAS NOT AFFECTED BY A SERIOUS CONFLICT OF INTEREST.

(B) CHRISTOPHER BURGER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL WHERE HIS TRIAL COUNSEL FAILED TO INVESTIGATE, PREPARE OR PRESENT EVIDENCE FOR THE SENTENCING PHASE OF PETITIONER'S CAPITAL TRIAL.

II. WHETHER THE AGGRAVATING CIRCUMSTANCE SET OUT IN GA. CODE ANN. §27-2534.1(b)(7) [OCGA §17-10-30 (b)(7)], THE SOLE AGGRAVATING CIRCUMSTANCE UPON WHICH CHRISTOPHER BURGER'S DEATH SENTENCE WAS BASED, WAS APPLIED IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

III. WHETHER THE TRIAL COURT'S INSTRUCTIONS TO THE JURY AT PETITIONER'S TRIAL IMPROPERLY SHIFTED THE BURDEN OF PROOF OF AN ESSENTIAL ELEMENT OF THE OFFENSE CHARGED IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

(A) THIS COURT HAS RECENTLY GRANTED CERTIORARI IN KOEHLER v. ENGLE, cert granted ___ U.S. ___, 104 S.Ct. 231 (1983). THE PRESENT CASE RAISES SIMILAR ISSUES, BUT IS INCONSISTENT WITH THE OPINION BELOW IN KOEHLER. ACCORDINGLY, THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THESE CONFLICTS.

(B) THE HOLDING OF THE COURT BELOW IS IN DIRECT CONFLICT WITH THE HOLDING OF THIS COURT IN SANDSTROM v. MONTANA, 442 U.S. 510 (1979).

(C) THE COURT SHOULD GRANT CERTIORARI IN THIS CASE IN ORDER TO CLARIFY TWO CRUCIAL AMBIGUITIES IN CONNECTICUT v. JOHNSON, ___ U.S. ___, 103 S.Ct. 969 (1983). DOING SO WILL ALSO PERMIT THIS COURT TO RESOLVE A SIGNIFICANT SPLIT IN THE LOWER COURTS CONCERNING THE MEANING OF SANDSTROM v. MONTANA.

(D) THE AREA OF CONSTITUTIONAL BURDEN OF PROOF REQUIREMENTS IS IN NEED OF ATTENTION BY THIS COURT DUE TO ITS AMBIGUITY AS PERCEIVED BY THE LOWER COURTS.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

CHRISTOPHER A. BURGER,	*	
	*	
Petitioner,	*	
v.	*	No. 83- _____
	*	
WALTER ZANT, Warden, Georgia Diagnostic and Classification Center,	*	
	*	
Respondent	*	

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner, Christopher Burger, requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit in Burger v. Zant, 718 F.2d 979 (1983). Christopher Burger is currently under sentence of death in the State of Georgia.

CITATION TO OPINION BELOW

The opinion of the Court of Appeals rendered on October 13, 1983 is reported at 718 F.2d 979. A copy of the Eleventh Circuit slip opinion is attached as Appendix A. Rehearing en banc was denied by the Court of Appeals on February 13, 1984. (Appendix B).

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The opinion of the Court of Appeals was rendered October 13, 1983, rehearing and rehearing en banc denied February 13, 1984.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following sections of the Georgia Code: Ga. Code Ann. §§26-1101(a); 27-2534; OCGA §§16-5-1(a); 17-10-30, which are attached as Appendix C.

HOW THE ISSUES WERE RAISED BELOW

Each of the constitutional issues in the Questions Presented were raised by petition for writ of habeas corpus in the district court and raised on appeal to the United States Court of Appeals for the Eleventh Circuit.

STATEMENT OF THE CASE[1]

A. Course of Proceedings

Seventeen (17) year old Christopher Burger, who had no prior criminal record, was convicted of one count of murder and sentenced to death on January 25, 1978 in the Superior Court of Wayne County, Georgia. On appeal to the Supreme Court of Georgia, the conviction was affirmed, but the death sentence was vacated and the case remanded for retrial solely on the issue of penalty. Burger v. State, 242 Ga. 28, 247 S.E. 2d 834 (1978).

On retrial, Christopher Burger was sentenced to death on July 19, 1979. The death sentence was affirmed by the Supreme Court of Georgia. Burger v. State, 245 Ga. 458, 265 S.E.2d 796, cert. denied, 448 U.S. 913 (1980).

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1. References to the transcript of Petitioner's first trial where the issue of guilt/innocence was decided will be designated "T Trial"; references to Petitioner's second trial where sentence was decided will be designated "T Sent. Trial"; references to the evidentiary hearing held in the habeas corpus proceedings in the United States District Court for the Southern District of Georgia will be designated "T H.C.".

On October 1, 1980, Petitioner filed a state Petition for Writ of Habeas Corpus in the Superior Court of Butts County, Georgia. The Petition was summarily denied without a hearing. On the same day, the Supreme Court of Georgia denied an application for certificate of probable cause to appeal.

On October 2, 1980, a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. §2254 was filed in the United States District Court for the Southern District of Georgia. An evidentiary hearing was held in the district court on March 4, 1981.

On April 29, 1981, the district court granted habeas corpus relief, only vacating Petitioner's death sentence. The district court denied relief on all other grounds alleged. Burger v. Zant, 513 F.Supp. 772 (S.D.Ga. 1981).

An appeal and cross-appeal of the district court's order were made to the United States Court of Appeals for the Eleventh Circuit.

On appeal, a panel of the Eleventh Circuit,[2] by a vote of 2-1, in an opinion by Circuit Judge Vance, reversed the district court's grant of habeas corpus relief and affirmed the district court in all other respects, effectively reinstating Petitioner's sentence of death. Circuit Judge Johnson dissented with an opinion. Burger v. Zant, 718 F.2d 979 (11th Cir. 1983), rehearing en banc denied, ___ F.2d ___ (Feb. 13, 1984).

B. Statement of Facts

Christopher Burger was convicted for the murder of Roger Honeycutt on September 5, 1977.

During the evening of September 5, 1977, seventeen (17) year old Christopher Burger and his twenty (20) year old co-indictee, Thomas Stevens, both privates in the Army, stationed at Ft.

2. Honorable Clarence Allgood, United States District Judge, Northern District of Alabama sat by designation.

Stewart, Georgia, were drinking heavily. When they ran out of money to buy beer, Stevens decided to rob a taxi driver to obtain more money. Stevens then obtained a knife and knife sharpener to accomplish the robbery.

Stevens and Christopher Burger called the taxi which was driven by Roger Honeycutt. Mr. Honeycutt was threatened with the weapons obtained by Stevens and Stevens took the sixteen dollars ($16.00) in Honeycutt's possession.

At Stevens' direction, Christopher Burger drove the taxi with Stevens and Mr. Honeycutt in the back seat. Mr. Honeycutt was then sexually assaulted by Stevens. After the assault, Stevens locked Roger Honeycutt in the trunk of the taxi.

Christopher Burger and Stevens then drove to the Savannah, Georgia airport to pick up James Botsford, an acquaintance of Stevens and Petitioner. Botsford testified for the state that during the drive, Stevens told him in great detail about the robbery of Roger Honeycutt and the fact that Honeycutt was still in the trunk of the car. During this time, Christopher Burger sat quietly; it appeared to Botsford that Christopher Burger was essentially doing as Stevens directed.

When Stevens suggested that he would kill Roger Honeycutt, Christopher Burger protested that they should let Honeycutt go and ditch the taxi.

After Botsford was dropped off at Fort Stewart, Georgia, Stevens directed Christopher Burger to drive the taxi to a pond in rural Wayne County, Georgia, a few miles from Fort Stewart. At Stevens direction, Christopher Burger drove the taxi into the pond, drowning Roger Honeycutt.

Stevens then disposed of the remaining physical evidence of the offense.

The further facts necessary to the issues raised in this petition will be stated in the argument of the issues.

REASONS FOR GRANTING THE WRIT

I.

PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

(A) CHRISTOPHER BURGER, AN INDIGENT, MENTALLY DEFICIENT, POSSIBLY BRAIN DAMAGED SEVENTEEN-(17) YEAR-OLD FACING THE DEATH PENALTY IN A STATE COURT CAPITAL TRIAL WAS ENTITLED TO THE APPOINTMENT OF COUNSEL WHOSE REPRESENTATION WAS NOT AFFECTED BY A SERIOUS CONFLICT OF INTEREST.

Alvin Leaphart of Leaphart & Smith, P.C., a two person law firm in Jesup, Georgia was appointed by the trial court as counsel for Christopher Burger at the state court trial, at the second penalty trial and on direct appeal to the Supreme Court of Georgia. Mr. Leaphart's law partner, Robert Smith, was appointed by the trial court to represent Thomas Stevens, the co-indictee of Christopher Burger (T-HC 13).

Mr. Leaphart never informed Christopher Burger of the possibility of a conflict of interest nor did the trial court which made the appointment of counsel ever inquire into the possibility of a conflict of interest (T-HC 15-16).

The facts of this conflict of interest are clearly summarized in Circuit Judge Johnson's dissent to the Eleventh Circuit's opinion in this case.[3] Judge Johnson summarized these facts as follows:

> . . . the record is clear that Burger's counsel was actively representing both Burger and his co-indictee Stevens and that an actual conflict of interest between the two violated Burger's right to the effective assistance of counsel.

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3. No facts of the conflict of interest were stated in the majority opinion. The majority opinion adopted, without further comment on this issue, the decision of the District Court below. Burger v. Zant, 718 F.2d at 981.

First, it is apparent that Burger's counsel actively represented both Burger and Stevens. Both Burger and Stevens were charged with and indicted for the murder of Roger Honeycutt. Both Burger and Stevens were appointed counsel by the trial court at approximately the same time, and within a few weeks after they had been charged with the crime. Burger's appointed counsel, Leaphart, and Stevens' appointed counsel, Smith, were partners in a two-partner law firm. [T-HC 13-15]. At the federal habeas hearing, Leaphart testified that he interviewed both Burger and Stevens. [T-HC 15]. Leaphart testified that he assisted Smith in the preparation of Stevens' case and that Smith assisted him in the preparation of Burger's case. [T-HC 15, 18]. Leaphart and Smith discussed the issues involved in each case and researched the law together. [T-HC 18]. Smith sat at counsel table and assisted Leaphart during Burger's trial. [T-HC 18]. Although not physically present at Stevens' trial, Leaphart testified that 'I worked then with - discussed the issues with Dob [Smith]. We researched the law together.' [T-HC 18]. Smith and Leaphart collaborated in preparing the briefs for both Burger and Stevens on each defendant's first appeal to the Supreme Court of Georgia; Leaphart testified that he 'primarily' prepared the briefs for Burger and Stevens on the second appeal to the Supreme Court of Georgia. [T-HC 40-41]. The fee received by each attorney for representing each client was deposited in the law firm's corporate account. [T-HC 14-15, 27-28]. At no time in his representation of Burger did Leaphart or the trial court ever inform Burger of a possible conflict of interest. [T-HC 15-16]

Whether analyzed as a situation where one attorney, Leaphart, represented both Burger and Stevens, or where one law firm represented both Burger and Stevens, the end result on these facts is the same: Leaphart was actively involved in the defense of both to the extent that a conflict of interest was clearly established.

* * * * * * * *

In this case, the fundamental issue, as perceived by counsel, was not that of guilt, but of culpability. Upon the habeas corpus hearing Leaphart testified at length concerning the evidence supporting Burger's lesser degree of culpability for the murder as compared to Stevens'. Summarized, the evidence was that at the time the crime was

committed Burger was seventeen; Stevens was twenty. [T-HC 22]. Burger has an I.Q. of 82 and possible brain damage. [T-HC 25; T Trial I 244, 247-248]. Stevens appeared to be the leader in their relationship; Burger the follower. Stevens planned and initiated the robbery of the victim; Burger followed his instructions. Stevens actually committed the robbery; Stevens made the victim undress; Stevens forced the victim to perform oral sodomy on Stevens; Stevens anally sodomized the victim; Stevens tied the victim up and forced him to get in the trunk of the cab. Stevens told Burger they would have to kill him; Burger said he didn't want to kill him. Stevens told Burger they would have to get rid of the cab by driving it into the pond; Stevens ordered Burger to drive the cab with the victim locked in the trunk into the pond. Burger drove the cab and the victim into the pond. [T -HC 22-23]. In short, the essence of Burger's defense was that he was less culpable than Stevens.

In such a situation, any evidence or arguments made by counsel in Burger's behalf would, by the very nature of Burger's defense,damage Stevens. An actual conflict of interest between Burger and Stevens is thus apparent. Stated differently, Burger's interests were drastically adverse to those of Stevens.

* * * * * * *

The course of Burger's state court proceedings illuminates the duty owed him by Leaphart to take actions that could be detrimental to Stevens. First, Leaphart did not at any time in his representation of Burger offer Burger's testimony against Stevens in exchange for a sentence less than the death penalty for Burger. [T-HC 38-39, 65].

* * * * * * *

Second, at Burger's trial Stevens was not called as a witness by the defense. If Stevens had been called by the state, Leaphart would have been placed in the untenable position of cross-examining his own client. Finally, Leaphart prepared the briefs for both Burger and Stevens on each defendant's second appeal to the Supreme Court of Georgia. In Burger's brief, Leaphart does not argue that he was the less culpable party, although the scope of the Supreme Court of Georgia's appellate review

> in capital cases includes a consideration of whether the 'sentence of death is excessive or disproportionate to the penalty in similar cases, considering both the crime and the defendant.' OCGA §17-10-35(c) (3) (1982), formerly Ga. Code Ann. §27-2537 (c)(3) (1933).

Burger v. Zant, 718 F.2d at 988-990, (dissenting opinion of Circuit Judge Johnson). (Emphasis added) (footnotes omitted).

A situation more conducive to divided loyalties than the situation in this case can hardly be imagined. Faced with the serious conflicts between Christopher Burger and Stevens, there is no way that the two law partners could vigorously and fully represent Christopher Burger while also representing Stevens.[4] Attorney Leaphart perceived a defense based on the seventeen-(17) year-old Christopher Burger's lesser culpability vis-a-vis the adult Stevens. However any action taken by Leaphart on behalf of Christopher Burger would work to the extreme disadvantage of Stevens.

Faced with the previously detailed disparity in the culpabilities of the parties and realizing that punishment rather than guilt or innocence was the major issue in this case, Attorney Leaphart should have offered Christopher Burger's testimony against Stevens to the prosecution in exchange for a lesser sentence than death. Unfortunately, Mr. Leaphart never even raised this possibility in plea discussions with the State (T-HC 38-39, 65). And, of course, how could he have arranged this plea negotiation when his divided loyalties also required the protection of Stevens.

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4. This Court recently reemphasized the importance of consideration of the individual in the sentencing phase of a capital case. Eddings v. Oklahoma, 455 U.S. 104, 112 (1982):

> ". . . the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender . . . as a constitutionally indispensable part of the

This Court in Wood v. Georgia, 450 U.S. 261, 268-69 (1981), clearly recognized as one of the "inherent dangers" of a conflict of interest that the attorney with divided loyalties "will prevent his client from obtaining leniency by preventing his client from offering testimony against" the more culpable party.[5]

In Holloway v. Arkansas, 435 U.S. 475, 489-90 (1978), this Court, in addressing the problem of conflicts of interest in the representation of multiple defendants by single counsel, stated:

> Joint representation of conflicting interests is suspect because of what it tends to prevent the attorney from doing. For example, in this case it may well have precluded defense counsel . . . from exploring possible plea negotiations and the possibility of an agreement to testify for the prosecution, provided a lesser charge or a favorable sentencing recommendation would be acceptable.

Leaphart was actively involved in the representation of Christopher Burger's co-defendant, Stevens; he consulted

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(Footnote 4, continued)

> process of inflicting the penalty of death [quoting Gregg v. Georgia]"
>
> * * * * * *
>
> "By holding that the sentencer in capital cases must be permitted to consider any relevant mitigating factor, the rule in Lockett [v Ohio] recognizes a consistency produced by ignoring individual differences is a false consistency" (emphasis added).

5. The Supreme Court of Georgia, subsequent to Christopher Burger's trials, adopted a mandatory rule in death penalty cases that co-defendants must be provided with separate and independent counsel. This rule applies with equal force to representation by a single attorney or by members of the same law firm. Fleming v. State, 264 Ga 90, 270 S.E.2d 185, 188 and n.7 (1980). "Such a rule is especially necessary where the death penalty is sought, because in these cases even a slight conflict, irrelevant to guilt or innocence, may be important in the sentencing phase." Id. at 188.

   The logic of this rule, explained by Justice Bowles of the Georgia court in his concurring opinion is particularly

confidentially with Stevens, aided in preparing his case for trial and prepared his briefs on appeal (T-HC 13-18). However, even had Leaphart not been directly involved in the representation of Stevens, a Sixth Amendment conflict of interest would still exist where the joint representation was by two different members of the same firm.[6]

(Footnote 5, continued)

relevant in Christopher Burger's case:

> No two defendants share equal responsibility for a crime . . . One may [be] entitled to leniency based on such factors as age, intelligence, motive, background, previous conduct or record, etc. Common counsel eliminates any practical possibility of plea bargaining.
>
> Id. at 189 (Bowles, J, concurring) (emphasis added).

6. Eg. United States v. Flannagan, 679 F.2d 1075 (3d Cir. 1982); Ross v. Heyne, 638 F.2d 979, 983 (7th Cir. 1980); Zuck v. Alabama, 588 F.2d 436, 438 (5th Cir. 1979); United States v. Donahue, 560 F.2d 1039, 1042 (1st Cir. 1977).

Cf. ABA CODE OF PROFESSIONAL RESPONSIBILITY DR5-105 (D); ABA Standards Relating to the Administration of Criminal Justice, The Defense Function §3.5(b):

> Except for preliminary matters such as initial hearings or applications for bail, a lawyer or lawyers who are associated in practice should not undertake to defend more than one defendant in the same criminal case if the duty to one of the defendants may conflict with the duty to another. The potential for conflict of interest in representing multiple defendants is so grave that ordinarily a lawyer should decline to act for more than one of several co-defendants except in unusual situations when, after careful investigation, it is clear that no conflict is likely to develop and when the several defendants give an informed consent to such multiple representation. (emphasis added).

The fault in this case lies not only with Mr. Leaphart who failed to call to the court's or Christopher Burger's attention the conflict of interest.[7] The blame must fall, possibly more heavily, on the trial court which appointed one law firm to represent both co-defendants and failed to ever inform Christopher Burger of the conflict.

As stated by the Fifth Circuit in Foxworth v. Wainwright, 516 F.2d 1072, 1076[8] (5th Cir. 1975):

> The trial judge has an obligation, however, to anticipate conflicts reasonably foreseeable at the outset of the case when counsel is appointed.
>
> * * * * *
>
> . . . courts must avoid compromising counsel's ability to represent a client zealously within the bounds of the law by appointing one lawyer to defend two or more parties with inconsistent interests.

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7. Cf. Holloway v. Arkansas, 435 U.S. at 485: ". . . defense attorneys have the obligation, upon discovering a conflict of interest, to advise the court at once of the problem."

   Contrast the circumstances of Christopher Burger's case with those in United States v. Mandell, 525 F.2d 671 (7th Cir. 1975) where trial counsel informed his client of the possible dangers of multiple representation of co-defendants:

   > "We think the Sixth Amendment rights of defendants are adequately safeguarded by imposing the duty of informing defendants of the potential dangers of multiple-client representation initially on the attorneys, as officers of the court. . ." Id. at 677 (emphasis added).

8. The quoted language from Foxworth v. Wainwright was noted with approval in Cuyler v. Sullivan, 446 U.S. 335, 347, n.13 (1980) as an exception to the general rule that the trial court is not required to automatically inquire into the circumstances of multiple representation.

Although great prejudice to Christopher Burger is shown from the facts of the conflict of interest in this case, a showing of prejudice is not necessary. "Thus, a defendant who shows that a conflict of interest actually affected the advocacy of his representation need not demonstrate prejudice in order to obtain relief." Cuyler v. Sullivan, 446 U.S. 335, 349-50 (1980).

As this Court noted in Holloway v. Arkansas, 435 U.S. at 490:

> ". . . in a case of joint representation of conflicting interests the evil -- it bears repeating -- is in what the advocate finds himself compelled to refrain from doing, not only at trial but also as to possible pretrial negotiations and in the sentencing process . . . Thus, an inquiry into a claim of harmless error here would require, unlike most cases, unguided speculation.

(B) CHRISTOPHER BURGER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL WHERE HIS TRIAL COUNSEL FAILED TO INVESTIGATE, PREPARE OR PRESENT EVIDENCE FOR THE SENTENCING PHASE OF PETITIONER'S CAPITAL TRIAL

This Court has recently granted certiorari in Washington v. Strickland, 693 F.2d 1243 (5th Cir. 1982) (Unit B, en banc), cert. granted, ___ U.S. ___, 103 S.Ct. 2451 (1983) to consider the issue of the standard for the effective assistance of counsel at the penalty phase of a death penalty trial. As will be developed below, trial counsel's representation of Christopher Burger raises issues similar to those currently before this Court in Washington v. Strickland.

Attorney Leaphart presented absolutely no evidence on Christopher Burger's behalf at either trial; more particularly, no evidence in mitigation was presented on Christopher Burger's behalf at his second trial where sentencing was determined. This failure to present evidence in mitigation of sentence was based not upon "informed professional deliberation", but rather was based on "inexcusable ignorance or senseless disregard of [his] client's rights". Washington v. Strickland, 693 F.2d at 1251.

The Sixth Amendment to the Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense". The Court has frequently emphasized the "fundamental" nature of this constitutional provision, Gideon v. Wainwright, 372 U.S. 335, 343-44 (1963), since, "[t]he assistance of counsel is often a requisite to the very existence of a fair trial." Argersinger v. Hamlin, 407 U.S. 24, 31 (1972). The repeated theme of the Court's decisions is that counsel serves "as a guide through complex legal technicalities" for the lay person, United States v. Ash, 413 U.S. 300, 307 (1973), and as a counterweight in the

adversary system to the creation of a professional prosecuting official. Id. at 309.

Counsel must provide assistance "within the range of competence demanded by attorneys in criminal cases". McMann v. Richardson, 397 U.S. 759, 771 (1970). This encompasses the level of competency provided by attorneys with knowledge, skill, judgment and diligence in the sound practice of criminal law. Cf. Cooper v. Fitzharris, 586 F.2d 1325, 1330 (9th Cir. 1978) (en banc); Moore v. United States, 432 F.2d 730, 736 (3d Cir. 1970).

It necessarily follows from counsel's role that an attorney "must make an independent examination of the facts, circumstances, pleadings and law involved" in order to be in the position to exercise sound professional judgment for the accused. Van Moltke v. Gillies, 332 U.S. 708, 721 (1945). The consensus of the circuits on this point is well-expressed in Moore v. United States, 472 F.2d at 735:

> The careful investigation of a case and the thoughtful analysis of the information it yields may disclose evidence of which even the defendant is unaware and may suggest issues and tactics at trial which would otherwise not emerge.

"At the heart of the duty of effective representation is the independent duty to investigate and prepare." Goodwin v. Balkcom, 684 F.2d 794, 805 (11th Cir. 1982).

The district court below found that Leaphart's investigation into available mitigating evidence consisted solely of conversations with Christopher Burger's mother. 513 F.Supp. at 796-797 and n. 6. These "conversations" were woefully inadequate and apparently occurred only when Christopher Burger's mother arrived in Jesup, Georgia from Louisiana for the trial. As Mr. Leaphart testified at the habeas corpus hearing:

> "Q. When is the first time you talked to any of his [Christopher Burger's] family?
>
> A. [By Mr. Leaphart] Whenever they came to town.

Q. Did you call and tell them about the trial?

A. No, I don't think I did.

Q. Well, the time that the trial was going to happen the first time, you had talked to the family before the--before the supposed--

A. I can't remember. I think I talked with his mother, at some point in time.

Q. Before that.

A. Before the trial?

Q. Before she came to town. You had talked to her.

A. I may have talked to her on the phone. I can't remember.

Q. Did you ask her anything about his background?

A. Yes, I think we discussed it.

Q. Did you explain to her what the penalty phase of the trial was about, and what evidence could be presented then?

A. I don't think I went into that with her."

(T-HC at 36) (emphasis added).

Had Leaphart conducted even a minimal investigation, a wealth of mitigating circumstances could have been found. Judge Johnson in dissent to the Eleventh Circuit's opinion summarized these mitigating circumstances:

> At the federal habeas hearing, Burger offered the testimony of his mother and numerous affidavits concerning his troubled childhood and background. Summarized, this evidence was that Burger's parents had been married when his mother was fourteen and his father was sixteen. [T-HC 81]. His parents divorced when he was a child. Neither parent wanted Burger and his childhood was spent shuffled between the two. His father threw him out of the house; his mother sent him back to live with his father. [T-HC 84]. Burger's mother remarried. Burger's stepfather beat Burger, and beat Burger's mother in his presence; Burger's stepfather involved him in drugs and alcohol when he was

> eleven years old. [T-HC 84-85]. Burger's mother and stepfather moved from Indiana to Florida. Burger was sent to live with his father. Burger's father beat him and refused to have anything to do with him. Burger ran away and hitchhiked to Florida to live with his mother, selling his shoes to buy food along the way. When Burger arrived barefoot in Florida his stepfather told him he could not stay with them. Burger's mother told the juvenile authorities that she didn't want him, and to send him back to his father in Indiana. When Burger arrived in Indiana, his father locked him out of the house. [T-HC 85-86]. Burger was taken in by a neighbor, as he had nowhere else to go. [Cf. Affidavits at R-142-153]. The clinical psychologist who examined Burger testified at a motion hearing that Burger had an I.Q. of 82 and possible brain damage.[9] [T Trial 244, 247-248].
>
> It is absolutely astounding to me that none of this evidence was ever presented to Burger's juries. . .

Burger v. Zant, 718 F.2d at 993 (dissenting opinion of Circuit Judge Johnson).

Leaphart's failure to present this evidence was not a strategic choice. At the federal habeas hearing Leaphart testified:

> "[I] did not have any knowledge of any witnesses that - potential witnesses - that I thought would have benefited him [at sentencing]. Had I known or had any knowledge of any, I would - certainly would have used them.
> (T-HC 44) (emphasis added).

Leaphart assumed, without knowing, that all he could have found would be persons to say that Christopher Burger "was a good boy and went to church", etc. (T-HC 52). Any investigation at all would have corrected this mistaken impression.

---

9. This evidence of Christopher Burger's low I.Q. and possible brain damage was presented only at a motion hearing but was never presented to the jury at either trial.

Two other excuses, outside of the failure to investigate, were given for Leaphart's failure to present evidence in mitigation: (i) Leaphart testified that he wished to preserve opening and closing argument for the defense (T-HC 66-67); (ii) the District Court reasoned that Leaphart wanted to argue to the jury that Christopher Burger had never been in trouble before. 513 F.Supp. at 797.

Neither of these excuses hold water: (i) Ga. Code Ann. §27-2503 (a) & (c) [OCGA §17-10-2 (a) & (c)] provide for the order of closing arguments at sentencing proceedings in capital cases: "The district attorney shall open and the defendant or his counsel shall conclude the argument." There is only one argument by each party. The presentation of evidence by the defendant at a capital sentencing proceeding in no way affects this division of argument between the state and the defense. In fact, this procedure was followed at Burger's sentencing proceedings: the district attorney opened and Leaphart closed final arguments to the jury. (T Sent. Trial at 234, 250). Leaphart simply failed to inform himself of basic Georgia criminal procedure in sentencing proceedings. Cf. Young v. Zant, 677 F.2d 792 (11th Cir. 1982).

(ii) At no point in his closing argument at the sentencing trial (T Sent. Trial at 250) did Leaphart argue that Christopher Burger had no record or had never been in trouble before.[10] The District Court's reasoning that he had done so is simply not supported by the record. Leaphart's argument would have been assisted, not harmed, by evidence of Christopher Burger's background.

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10. Christopher Burger's past encounters with the law were for the juvenile status offense of runaway and an automobile accident; he had no prior criminal record.

The mitigating circumstances present in seventeen (17) year old Christopher Burger's case are strikingly similar to those of sixteen-(16) year-old Eddings in Eddings v. Oklahoma, 455 U.S. 104 (1982). If anything, the mitigation in Burger's case is more persuasive.

As this Court stated in Eddings:

> "Evidence of a difficult family history and of emotional disturbance is typically introduced by defendants in mitigation [cite omitted]. In some cases such evidence properly may be given little weight. But when the defendant was 16 years old at the time of the offense, there can be no doubt that evidence of a turbulent family history of beatings by a harsh father, and of severe emotional disturbance is particularly relevant.
>
> * * * * * *
>
> . . . just as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered in sentencing.
> Eddings, 455 U.S. at 115-116.

Eddings' death sentence was reversed by this Court because his sentencer [a judge] refused to consider Eddings' background as a mitigating factor. Christopher Burger's sentencer [a jury] failed to consider Chris' background as a mitigating factor; this was due to trial counsel's failure to investigate or present the evidence. In both Eddings and Chris Burger's case, the sentence of death was imposed without consideration of a "particularly relevant" . . . "mitigating factor of great weight." Id.

II.

CHRISTOPHER BURGER'S DEATH SENTENCE WAS BASED SOLELY ON THE AGGRAVATING CIRCUMSTANCE SET OUT IN GA. CODE ANN. §27-2534.1(b)(7); OCGA §17-10-30(b)(7) WHICH WAS APPLIED IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In Georgia, a death sentence may not be imposed absent a finding by the jury, beyond a reasonable doubt, of at least one statutory aggravating circumstance. Ga. Code Ann. §27-2534.1(c); OCGA §17-10-30(c). As this Court recently reiterated, ". . . an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." Zant v. Stephens, ___ U.S. ___, 103 S.Ct. 2733, 2742-43 (1983).

The jury at Christopher Burger's sentencing trial based its death sentence verdict upon the statutory aggravating circumstance set out in Ga. Code Ann. §27-2534.1(b)(2); OCGA §17-10-30(b)(2) and the aggravating circumstance set out in Ga. Code Ann. §27-2534.1(b)(7), OCGA §17-10-30(b)(7) "the offense of murder was outrageously and wantonly vile, horrible or inhumane in that it involved torture, depravity of mind or an aggravated battery to the victim") (T Sent. Trial at 305-306).

On direct appeal, the Supreme Court of Georgia struck as improperly found the aggravating circumstances based on §(b)(2), but upheld the death sentence based solely on the remaining §(b)(7) aggravating circumstance. Burger v. State, 245 Ga. 458, 265 S.E.2d 796, 800 (1980).

In the habeas corpus proceeding, the United States District Court vacated Christopher Burger's death sentence based on the former Fifth Circuit's decision in Stephens v. Zant, 631 F.2d 397, modified, 648 F.2d 446 (1981), rev'd, ___ U.S. ___, 103 S.Ct. 2733 (1983). On appeal, after this Court's decision

reversing the decision of the Fifth Circuit in Stephens v. Zant, the Eleventh Circuit reversed this portion of the district court's judgment, 718 F.2d at 981-82, effectively reinstating Christopher Burger's sentence of death.

Under this Court's holding in Zant v. Stephens, supra, a sentence of death, in Georgia, may be upheld if one valid statutory aggravating circumstance is found by the jury, even if that jury also improperly found other aggravating circumstances. Cf. Zant v. Stephens, 250 Ga. 97, 297 S.E.2d 1 (1982). However, the only statutory aggravating circumstance found by the jury and upheld by the Supreme Court of Georgia in Christopher Burger's case was the §(b)(7) aggravating circumstance.

In Zant v. Stephens, supra, this Court stated the following concerning the §(b)(7) aggravating circumstance:

> "Thus this case [Zant v. Stephens] does not implicate our holding in Godfrey v. Georgia, 446 U.S. 420 (1980), that the (b)(7) aggravating circumstance as construed by the Georgia Supreme Court was unconstitutionally broad and vague".
> Zant v. Stephens, 103 S.Ct. at 2737, n.4.

* * * * * *

> The plurality's approval of Georgia's capital sentencing procedure [in Gregg v. Georgia] rested primarily on two features of the scheme: that the jury was required to find at least one valid statutory aggravating circumstance and to identify it in writing, and that the state supreme court reviewed the record of every death penalty proceeding to determine whether the sentence was arbitrary or disproportionate. These elements, the opinion [Gregg v. Georgia] concluded, adequately protected against the wanton and freakish imposition of the death penalty. This conclusion rested, of course, on the fundamental requirement that each statutory aggravating circumstance must satisfy a constitutional standard derived from the principles of Furman itself. For a system 'could have standards so vague that they would fail adequately to channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing like that found

unconstitutional in Furman could occur.' 428 U.S., at 195, n. 46. To avoid this constitutional flaw, an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.

Thus in Godfrey v. Georgia, 446 U.S. 420(1980), the Court struck down an aggravating circumstance that failed to narrow the class of persons eligible for the death penalty. Justice Stewart's opinion for the plurality concluded that the aggravating circumstance described in subsection (b)(7) of the Georgia statute, as construed by the Georgia Supreme Court, failed to create any 'inherent restraint on the arbitrary and capricious infliction of the death sentence,' because a person of ordinary sensibility could find that almost every murder fit the stated criteria. Id., at 428-429.[16] . . .

* * * * * *

---

16. This Court's conclusion in Godfrey was analogous to the Georgia Supreme Court's holding in Arnold v. State that the second clause of the (b)(1) aggravating circumstance, which is at issue in this case, was 'too vague and nonspecific to be applied evenhandedly by a jury.' 236 Ga., at 541. The defendant in that case, who had two prior convictions, had been sentenced to death by the jury solely on a finding that he had a 'substantial history of serious assaultive criminal convictions.' The court concluded that the words 'substantial history' were so highly subjective as to be unconstitutional. Id., at 542; see n. 5 supra. That aggravating circumstance, in the view of the Georgia Supreme Court, did not provide a principled basis for distinguishing Arnold's case from the many other murder cases in which the death penalty was not imposed under the statute.

Zant v. Stephens, 103 S.Ct. at 2742-43, and n. 16 [footnotes 14 and 15 omitted].

This Court in Zant v. Stephens has made clear its ruling in Godfrey v. Georgia, 446 U.S. 520 (1980) that the §(b)(7) circumstance has been unconstitutionally applied in Georgia. Thus, a death sentence based solely on §(b)(7), such as Christopher Burger's, cannot stand.

III.

THE TRIAL COURT'S INSTRUCTIONS TO THE JURY AT PETITIONER'S TRIAL IMPROPERLY SHIFTED THE BURDEN OF PROOF OF AN ESSENTIAL ELEMENT OF THE OFFENSE CHARGED IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

(A) THIS COURT HAS RECENTLY GRANTED CERTIORARI IN KOEHLER v. ENGLE, cert. granted ___ U.S. ___, 104 S.Ct. 231 (1983). THE PRESENT CASE RAISES SIMILAR ISSUES, BUT IS INCONSISTENT WITH THE OPINION BELOW IN KOEHLER. ACCORDINGLY, THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THESE CONFLICTS.

In Koehler v. Engle, 707 F.2d 241, the Sixth Circuit reviewed a set of trial instructions in a trial for murder to the affect that the law provides "a rule of thumb" that "a person is presumed to intend the natural consequences of his acts." Id. at 243. The Sixth Circuit found that these instructions violated Sandstrom, regardless of the presence of other curative instructions. Moreover, the Sixth Circuit stated that such instructions "can be extremely prejudicial even if overall proof of intent or malice is substantial," Id. at 246, and thus declined to find the error harmless.

The present case presents very similar issues to those in Koehler. The instructions are similar, and each case possesses attempted curative instructions. In the present case, however, the Eleventh Circuit affirmed the conviction, and thus it is inconsistent with Koehler. Certiorari is appropriate to resolve this conflict among the circuits.

(B) THE HOLDING OF THE COURT BELOW IS IN DIRECT CONFLICT WITH THE HOLDING OF THIS COURT IN SANDSTROM v. MONTANA, 442 U.S. 510 (1979).

In Sandstrom v. Montana, this Court held that the Due Process Clause of the Fourteenth Amendment was violated by a jury instruction that "the law presumes that a person intends the ordinary consequences of his acts" because such an instruction could have been interpreted by the jury either to direct a verdict on the issue of intentionality or to shift the burden of proof on it to the defendant, 442 U.S. at 512. In the Petitioner's case, the State of Georgia was required to prove, among other elements, that the defendant committed the act intentionally, and that he committed the act with malice.[11] The trial court gave the following instructions[12] on these issues that unmistakenly could have been interpreted to shift the burden of proof to the defendant:

> Now, by definition, ladies and gentlemen, in our State a crime is a violation of a statute of this State in which there shall be a union of joint operation of act, or omission to act, and intention, or criminal negligence. I give you certain presumptions of law that are applicable to this case.
>
> A presumption is a conclusion which the law draws from given facts. Each of these presumptions are rebuttable. That is, they are subject to being overcome by evidence to the contrary.
>
> I charge you now the presumptions that are rebuttable. Every person is presumed to be of sound mind and discretion. The acts of a person of sound mind and discretion are presumed to be the products of the person's will. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts. A person will not be presumed to act with criminal intention, but the jury may find such

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11. Petitioner was indicted for malice murder. Ga. Code Ann. §26-1101(a); OCGA §16-5-1(a).

12. The complete instructions given at the guilt/innocence phase of Petitioner's trial are set forth in Appendix D to this Petition.

> intention upon consideration of the words, conduct, demeanor, motive and all other circumstances connected with the act for which they [sic] accused is prosecuted.
>
> A specific intent to commit the crime charged in this indictment is an essential element that the State must prove beyond a reasonable doubt. Intent is always a question for the jury, and is ordinarily ascertained by acts and conduct. Intent may be shown in many ways, provided the jury finds that it existed from the evidence produced before you. It may be inferred from the proven circumstances, or by acts and conduct, or it may be presumed when it is the natural and necessary consequences of the act. (T Trial 410-411) (emphasis added).

These instructions contain the language crucial to the holding in Sandstrom, "the law presumes," and deal with an element that the state was required to prove beyond reasonable doubt. Moreover, with respect to these presumptions, further instructions informed the jury that these presumptions may be "rebutted." The term "rebutted" is not defined, however, thus leaving it to the jury to speculate what is required to "rebut" the presumptions of malice and intentionality. As a result, like the Sandstrom instruction, each instruction could be interpreted as shifting a burden of persuasion to the defendant.

The order of the district court below, adopted by the panel of the Eleventh Circuit, avoided this obvious conclusion by asserting that other qualifying instructions surrounding the presumptive language rendered the instructed presumption no more than a permissive interference, 513 F.Supp. at 792, and that the instruction as a whole contained enough qualifying language to avoid the holding in Sandstrom. Even if the instructions are viewed as a whole, however, the instant instructions are a clear violation of the principles underlying Sandstrom. To be sure, there is qualifying language in Burger (e.g., "these presumptions are rebuttable") T. Trial at 410, but there is qualifying language in Sandstrom as well, [e.g., the jury "must be convinced beyond reasonable doubt . . . that the defendant caused the death

of (the victim) purposely or knowingly"] Sandstrom Petition for Writ of Certiorari Appendix at 34-35. There is another critical similarity between the instructions in the two cases. Both Sandstrom's and Burger's instructions failed to define the word "presumption" and failed to articulate any standard for applying the presumption or for rebutting the presumption. Thus, even looking at Petitioner's instructions in their entirety, they are in obvious conflict with this Court's decision in Sandstrom v. Montana.

(C) THE COURT SHOULD GRANT CERTIORARI IN THIS CASE IN ORDER TO CLARIFY TWO CRUCIAL AMBIGUITIES IN CONNECTICUT v. JOHNSON, ___ U.S. ___, 103 S.Ct. 969 (1983). DOING SO WILL ALSO PERMIT THIS COURT TO RESOLVE A SIGNIFICANT SPLIT IN THE LOWER COURTS CONCERNING THE MEANING OF SANDSTROM v. MONTANA.

In Connecticut v. Johnson, ___ U.S. ___, 103 S.Ct. 969 (1983), this Court issued a judgment affirming a decision of the Supreme Court of Connecticut in order to resolve a conflict in the lower courts concerning the nature of harmless error analysis as applied in the Sandstrom context. ___ U.S. at ___, 103 S.Ct. at 971. This Court did not resolve that conflict, however. Four members of the Court concurred in the plurality decision, but four dissented, and the ninth justice concurred specially in the judgment. Therefore, the split in the lower courts that gave rise to Johnson remains unresolved. See, e.g., Engle v. Koehler, 707 F.2d 241, at 246 (6th Cir. 1983) cert. granted, ___ U.S. ___, 104 S.Ct. 231 (1983) (citing Connecticut v. Johnson and commenting "the Supreme Court has not supplied clear guidance on this question").

Additionally, and more importantly, this case presents a vehicle for resolving another ambiguity concerning harmless error analysis that has generated yet another split in the circuits. Johnson dealt with whether a conviction may ever be affirmed if

there is a Sandstrom violation in the instructions. The related question that needs to be resolved is whether any curative instructions can rectify the harm done by an instruction to the effect that "the law presumes intent."

In this case, the district court below found that curative instructions did cure the Sandstrom error. In Sandstrom, though, this Court suggested that curative instructions most likely could not offset the harm engendered by "the law presumes" instructions. 442 U.S. at 518-19, n.7. However, the lack of clear guidance on that point has generated another split in the lower courts in need of resolution. In Burton v. Bergman, 649 F.2d 428 (1981), the Sixth Circuit held that the use of the word "presume" is unconstitutional under Sandstrom because of its mandatory tone, while the Eleventh Circuit, adopting the district court's order, in the present case held that the word "presume" or its derivations may be employed in instructions. Moreover, these two cases are merely representative of the great difficulty the lower courts are having in determining how to apply Sandstrom to jury instructions.[13] Thus, this Court should grant certiorari in order to give further guidance to the lower courts on this important matter.

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13. Other courts have held, for example, that "curative language" exacerbates rather than ameliorates the constitutional problems. See, e.g., Dietz v. Solem, 640 F.2d 126 (8th Cir. 1981); Baker v. Munay, 619 F.2d 327 (4th Cir. 1980).

(D) THE AREA OF CONSTITUTIONAL BURDEN OF PROOF REQUIREMENTS IS IN NEED OF ATTENTION BY THIS COURT DUE TO ITS AMBIGUITY AS PERCEIVED BY THE LOWER COURTS

Ever since this Court first held that proof beyond reasonable doubt is constitutionally required, the lower courts have been engaged in an effort to determine the scope of the requirement. Notwithstanding the continuing efforts by this Court to clarify matters, the perception in the lower courts is that the scope of the requirement of proof beyond reasonable doubt is very unclear. Indeed, one can find inconsistent decisions on virtually every aspect of the proof process. For example, compare, Carter v. Jago, 637 F.2d 449 (6th Cir. 1980) (self-defense is an affirmative defense; therefore the defendant must prove it by a preponderance of the evidence) with Holloway v. McElroy, 632 F.2d 605 (5th Cir. 1980) cert. denied, 451 U.S. 1028 (1981) (self-defense negates the unlawfulness element of murder; therefore the state must disprove its existence); Mancuso v. Harris, 677 F.2d 206 (2nd Cir. 1982) (language condemned in Sandstrom permissible here because preceded and followed by qualifying language) with Dietz v. Solem, 640 F.2d 126 (8th Cir. 1982) (even with qualifying language, instruction still unconstitutional under Sandstrom); Jacks v. Duckworth, 651 F.2d 480 (7th Cir. 1981) (burden shifting tendency of instruction cured by general instruction on the state's burden of proof and that the jury must consider instructions as a whole) with Dietz v. Solem, 640 F.2d 126 (8th Cir. 1981) (burden shifting or conclusive presumption is type of presumption contemplated in Cupp v. Naughten as constitutional error by itself); Burton v. Bergman, 649 F.2d 428 (6th Cir. 1981) (use of word "presume" unconstitutional under Sandstrom because it gives mandatory tone to instruction) with Wilson v. Zant, 249 Ga. 373, 290 S.E.2d 442 (1982) (presumption permissible despite word "presume" because

jury told it may infer or presume intent); Burton v. Bergman, 649 F.2d 428 (6th Cir. 1981) (Sandstrom retroactive because it raises serious questions about accuracy of guilty verdicts in past trials) with Pigee v. Israel, 503 F.Supp. 1170 (E.D. Wis. 1980) (Burden on criminal justice system, witnesses and families of victims compels that Sandstrom not be retroactively applied).

The view of the commentators is consistent with that of the lower courts. Virtually every scholar who has written in this general area has remarked on the tremendous ambiguity generated by the relevant precedents. [14] Certiorari is appropriate to bring badly needed clarity to this important area.

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14. See, e.g., Allen, Structuring Jury Decisionmaking in Criminal Cases: A Unified Constitutional Approach to Evidentiary Devices, 94 Harv. L. Rev. 321, 322 (1980) ("profusion of contradictory theories and results" in constitutional burden of proof cases); Nesson, Rationality, Presumptions, and Judicial Comment: A Response to Professor Allen, 94 Harv. L. Rev. 1574 ("reconciling the use of evidentiary devices . . . with the constitutional requirement of proof beyond reasonable doubt has been a persistent problem for courts . . ."). See also, Schmolesky, County Court of Ulster County v. Allen, and Sandstrom v. Montana: The Supreme Court Lends an Ear but Turns Its Face, 33 Rutgers L. Rev. 261 (1981); Jefferies & Stephan, Defense, Presumptions, and Burden of Proof in the Criminal Law, 88 Yale L. J. 1325, 1335 (1979); Lushing, Faces Without Features: The Surface Validity of Criminal Inferences, 72 J.C. & Crim. 82 (1981); Allen and DeGrazia, The Constitutional Requirement of Proof Beyond Reasonable Doubt in Criminal Cases: A Comment Upon Incipient Chaos in the Lower Courts, 20 Am. Crim. L. Rev. 1 1982).

CONCLUSION

For the reasons shown, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

Joseph M. Nursey
Millard C. Farmer
COUNSEL FOR PETITIONER

P.O. Box 1978
Atlanta, Georgia 30301
(404) 688-8116

CERTIFICATE OF SERVICE

I hereby certify that I have served counsel for the opposing party with a copy of the foregoing pleading by placing same in the United States Mail with adequate first-class postage attached thereon addressed to Mr. Michael J. Bowers, Attorney General, State of Georgia, 132 State Judicial Bldg., 40 Capitol Square, S.W., Atlanta, Georgia 30334.

This 13th day of March, 1984.

Joseph M. Nursey
COUNSEL FOR CHRISTOPHER BURGER

P.O. Box 1978
Atlanta, Georgia 30301
(404) 688-8116

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No. 83-

CHRISTOPHER A. BURGER,

Petitioner,

v.

WALTER ZANT, Warden,

Georgia Diagnostic Center,

Respondent

RECEIVED
MAR 14 1984
OFFICE OF THE CLERK
SUPREME COURT, U.S.

83-6413

MOTION FOR LEAVE TO PROCEED

IN FORMA PAUPERIS

Petitioner, Christopher Burger, by his undersigned counsel, asks leave to file the attached Petition for Writ of Certiorari without prepayment of costs and to proceed in forma pauperis. Petitioner's affidavit of indigency is attached to this motion.

Respectfully submitted,

Joseph M. Nursey
Millard C. Farmer

COUNSEL FOR PETITIONER

P.O. Box 1978
Atlanta, Georgia 30301
(404) 688-8116

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No. 83-6413

CHRISTOPHER BURGER *

Petitioner, *

v. *

WALTER D. ZANT, Warden, *

Georgia Diagnostic Center, *

Respondent *

AFFIDAVIT OF INDIGENCY

I, CHRISTOPHER BURGER, being first duly sworn, depose and say that I am the Petitioner in the above-entitled cause; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty, I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to relief.

I further swear that the responses which I have made to questions and instructions below are true.

1. Are you presently employed? Yes ___ No X

a. If the answer is "yes", state the amount of your salary or wages per month, and give the name and address of your employer.

_____

_____

b. If the answer is "no", state the date of last employment and the amount of the salary and wages per month which you received.

SEPTEMBER, 1977 - $471.00 (U.S ARMY)

2. Have you received within the past twelve months any money from any of the following sources?

a. Business, profession or form of self-employment? Yes ___ No X
b. Rent payments, interest or dividends? Yes ___ No X
c. Pensions, annuities or life insurance payments? Yes ___ No X
d. Gifts or inheritances? Yes X No ___
e. Any other sources? Yes ___ No X

If the answer to any of the above is "yes", describe each source of money and state the amount received from each during the past twelve months. APPROX $70.00 GIFTS

3. Do you own cash, or do you have money in a checking or savings account? Yes X No ___ (Include any funds in prison accounts.)

If the answer is "yes", state the total value of the items owned. $50.00

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes ___ No X

If the answer is "yes", describe the property and state its approximate value.

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: MARCH 5, 1984

Christopher Burger
CHRISTOPHER BURGER

Sworn to and subscribed to before me
this 5 day of March, 1984.

Aaron Rosenson
NOTARY PUBLIC

My commission expires:
9-20-87